



MMRP/HTRW

Small Business Issues



- NAICS 562910
- Size Standard – 500 Employees
- If set-aside for small business
  - Limitations of Subcontracting – FAR 52.219-14
  - Prime Contractor perform 50% of work



# Teaming Considerations



# What Types of Contractor “Teams” Does the FAR Recognize?

FAR 9.601 Reads:

- “**Contractor team arrangement**,” as used in this subpart, **means** an arrangement in which—
- Two or more companies form a partnership or **joint venture** to act as a potential prime contractor, or
  - A potential **prime contractor** agrees with one or more other companies to have them act as its **subcontractors** under a specified Government contract or acquisition program.



# What are the Benefits?

- General benefit for all concerns both large and small:
  - The joint venture or team is able to compete for larger more technically complex contracts by combining the capabilities and past performance of various team members.



# What Kind of “Contractor Associations” are Recognized by SBA Regulations?

- Joint Venture
  - Formal Joint Venture
    - Forms a separate legal entity, e.g., a limited liability corporation
  - Informal Joint Venture
    - A separate legal entity is not created



# What are the Benefits?

- Specific benefits\* for small business joint ventures (on larger procurements that meet certain requirements - see next slide):
  - Exception from affiliation for size purposes
  - Performance of work requirements (limitations on subcontracting) apply to the cooperative effort of the JV, not its individual members.

\*Beneficial on those procurements where concern must be small to be eligible for contract award.



# For What Procurements are SB JV's Excepted from Affiliation?

(13 CFR 121.103(h)(3))

- There is an exception to the normal rules of affiliation for joint ventures on procurements that meet the following requirements:
  - A bundled procurement of any dollar value; or
  - For a procurement having a receipts based size standard, the dollar value of the procurement exceeds  $\frac{1}{2}$  the size standard; or
  - For a procurements having an employee based size standard, the dollar value of the procurement exceeds \$10 million.
- For these procurements, the joint venture is considered small so long as each member is small under the size standard assigned to the procurement **and**,
- The performance of work requirements apply to the cooperative efforts of the joint venture.





# Why is there Confusion about Small Business Teaming?

- The term “teaming arrangement” was first used in SB regulations in June 30, 1998 when 13CFR 121.103(f)(3) was changed to read:
  - “A joint venture or teaming arrangement of two or more business concerns may submit an offer as a small business for a non-8(a) Federal procurement without regard to affiliation . . .” for certain larger procurements.



## Confusion (continued)

- In Oct 1999 the following provision was added to 13CFR 125.6, Prime Contractor Performance Requirements:
  - “(g) Where an offeror is exempt from affiliation under Sec. 121.103(f)(3) of this chapter and qualifies as a small business concern, the performance of work requirements set forth in this section apply to the cooperative effort of the team or joint venture, not its individual members.”



# Confusion (continued)

- A definition of “team” or “teaming arrangement” was not provided by the SB regulations.
- In Nov 2002 SBA proposed adding a definition for “teaming arrangement”.
- However, in final rule issued May 2004, no definition was provided:
  - The terms “teaming arrangement” and “team” were removed from 13CFR 121.103 and 125.6, and
  - 13CFR 121.103 was revised to read that “A joint venture may or may not be in the form of a separate legal entity.” The preamble referred to these as “formal” and “informal” joint ventures.



# Confusion (continued)

- FAR Part 9 uses the general term “contractor team arrangement” to include:
  - **Joint Venture** to act as prime contractor
  - **Prime/Subcontractor Teams**
- 13CFR now uses the general term “joint venture” to include:
  - **Joint Venture** where a separate legal entity is formed (the new entity acts as prime contractor)
  - **Joint Venture** where a separate legal entity is not formed
    - Considered by some to be simply a prime/subcontractor team by another name



# How does SBA Currently Define a Joint Venture?

13 CFR 121.103(h) reads:

A joint venture is an association of individuals and/or concerns with interests in any degree or proportion by way of contract, express or implied, consorting to engage in and carry out no more than three specific or limited-purpose business ventures for joint profit over a two year period, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally.



## SBA Definition – cont'd

This means that the joint venture entity cannot submit more than three offers over a two year period, starting from the date of the submission of the first offer. A joint venture may or may not be in the form of a separate legal entity. The joint venture is viewed as a business entity in determining power to control its management. SBA may also determine that the relationship between a prime contractor and its subcontractor is a joint venture, and that affiliation between the two exists, pursuant to paragraph (h)(4) of this section



# How did the New SBA Definition of JV Affect Teaming as a SB Tool?

- Air Force Policy Memo 2004-PK-007 dated Aug 19, 2004 stated that:
  - “The CFR refers to joint ventures but also states that the term ‘joint venture’ is not limited to legally formed joint venture entities but also refers to informally formed joint ventures. We interpret this to include what is commonly referred to as ‘team’ which is most frequently manifested in teams formed by a lead prime contractor with one or more first tier subcontractors.”



## Affect on SB Teaming (cont'd)

- The Air Force therefore concluded that SB teams were eligible for the exception to affiliation and for cooperative fulfillment of the performance of work requirements.
- SBA did not officially agree or disagree with the Air Force's interpretation of the regulations.
- As a result most other federal buying agencies adopted the Air Force guidance concerning SB prime/sub teams





# What are the Recent Developments Regarding SB JV's and Teams?

- SBA office of general counsel issued a legal analysis of small business regulations related to joint ventures in response to a GAO bid protest.
- Based on the SBA's response to GAO, the Air Force has rescinded its Policy Memo 2004-PK-007 dated 19 Aug 04.



## What Does the SBA Legal Analysis Have to Say?

- The legal analysis makes a point that in the final rule dated May 21, 2004, the SBA did not define the term “teaming arrangement”, but in fact deleted that term & the term “team” from the regulations and redefined business associations consorting to carry out business ventures for joint profit only in terms of “joint ventures”.



# Legal Analysis (continued)

- When a SB prime receives an award as a result of a solicitation set-aside for SBC's, the SB prime contractor, in general, must meet the performance of work requirements (subcontracting limitations) itself and not use subcontractors to meet this requirement.
- The one exception is that SBA's regulations allow the cooperative efforts of a joint venture to meet performance of work requirements on larger procurements where certain requirements are met.



# Legal Analysis (continued)

- Points to language in the preamble of the final rule issued May 21, 2004 that “. . . joint ventures may be in the form of a new legal entity (e.g., a limited liability corporation) or may be informal arrangements so long as the agreement between the business concerns explains that it is a joint venture and meets the regulation's definition of joint venture.



# Where Can I Find the CFR's

Federal Regulations (CFR) on-line:

- <http://ecfr.gpoaccess.gov>

Size regulations -- 13 CFR Part 121

8(a) & SDB regulations -- 13 CFR Part 124

Government Contracting Programs – 13 CFR  
Part 125.6

HUBZone Program – 13 CFR Part 126



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